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SIPDIS

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STATE FOR SCA/CEN (O'MARA) and EB/TPP/IBE (JBOGER)
STATE PASS USTR FOR JCHOE-GROVES
COMMERCE FOR ITA/MAC/OIPR (CPETERS)

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SUBJECT: KAZAKHSTAN: SPECIAL 301

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SUMMARY

1. (SBU) Over the past year, the Government of Kazakhstan (GOK) has continued to demonstrate a commitment to the development and modernization of its IPR protection regime. Despite an increase in the domestic production of pirated CD's and DVD's in Kazakhstan's two largest cities, the GOK, and more specifically the IPR Committee of the Ministry of Justice, continues to move forward in meeting international standards and addressing the concerns of the international community for the enhanced protection of IPR on the legislative, judicial, and enforcement fronts. Facing a continuing challenge to stem the flow of pirated goods from Russia and China, the GOK has also proposed legislation to further empower customs officials to seize counterfeit materials before they enter the country. Although criminal sentencing remains at low levels, and the lack of a public perception of the seriousness of IPR violations is problematic, ongoing educational programs and proposed legislative changes set to come to parliament for ratification in late spring 2008 are expected to significantly improve the IPR environment. Therefore, post recommends continuing Kazakhstan's exclusion from the Special 301 Watch List. End Summary.

ENFORCEMENT INCREASES, BUT CRIMINAL SENTENCES LAG

2. (SBU) IPR enforcement efforts continue to increase, and the numbers of convictions for administrative and criminal offenses grew in the last year. According to combined 2007 statistics released by the Ministry of Justice IPR Committee, and the Procurator General,

- 1971 IPR-related raids were conducted. As a result of these raids, 1418 entities (organizations and individuals) were charged with administrative penalties;
- 2670 administrative cases were initiated;
- 20,250,755 KZT (\$168,056) was collected in administrative fines (compared to 14,385,725 KZT, or \$116,013 in 2006);
- 229,979 counterfeit copies valued at 132,369,884 KZT (\$1,098,505) with unlicensed or illegal trademarks were confiscated (compared to 121 million KZT, or \$975,806, in 2006); and
- 658 criminal cases were initiated (compared to 268 in 2006).

3. (SBU) Of the 658 criminal cases initiated in 2007, 447 were sent to courts. Of these, 108 people were convicted under Part 1 of Article 184 of the Criminal Code, one person was convicted under Part 2, and 54 under Part 3. (NOTE: Parts 1-3 of Article 184 represent, in order, increasing categories of severity in both the level of the offense and severity of punishment, based on amount of damage, scale of the offense, repetition of the violation, etc. End note.) Penalties for those convicted of violations of Article 184

vary. They include fines ranging from 100 to 700 times the Monthly Calculation Unit (one Monthly Calculation Unit is currently set to 1,168 tenge, or \$9.60), the confiscation of 5 to 10 months' wages, community service of 100 to 240 hours, or imprisonment from 2 to 5 years and the possible confiscation of property.

14. (SBU) Despite the relatively high number of criminal convictions, no data has been made available regarding sentencing. According to an official at the General Prosecutor's Office, this most likely indicates that no individuals have been incarcerated, and that the criminal sentences were either reduced to administrative penalties, or suspended. (Comment: The lack of jail sentences remains of concern, indicating a continued perception within the courts that copyright infringement alone, in the absence of other criminal violations, does not merit incarceration. End Comment.)

----- NEW AND CONTINUED CHALLENGES -----

15. (SBU) Outside of Kazakhstan's two largest cities (Almaty and Astana), the vast majority of pirated media available originates in Russia and China. Russia -- with its many railway links to northern Kazakhstan -- presents a particular challenge for Kazakhstani authorities. As noted by the IIPA, customs officials continue to lack the ex officio authority required to seize counterfeit materials at the borders, when they are discovered.

16. (SBU) According to private industry representatives, 2007 has witnessed an increase in the availability and sales, particularly in Almaty and Astana, of domestically produced counterfeit CD's and DVD's. This is largely due to the increasing availability of pirating technology and the willingness of small-time media pirates to engage the police in the "cat and mouse" game of street sales. Industry representatives assert that local police charged with enforcing the prohibition of street sales are often unmotivated and indifferent to the presence of such vendors, if not directly paid to ignore them.

17. (SBU) The pursuit of rulings against IPR violators in civil courts remains problematic because of legal norms carried over from Soviet times. According to the Prosecutor General's office and private industry representatives, this is particularly so when licensed copyright holders attempt to sue vendors of pirated material for damages. Under current IPR legislation, plaintiffs are subjected to an unnecessarily heavy burden of proof, whereby they are required to demonstrate a direct contractual link to the artist or author whose pirated material is being illegally sold. (Note: An example would be a direct contract between a performer and record store. End note.) If a licensed copyright holder or distributor can not substantiate this direct linkage, they can not, in the eyes of the court, demonstrate financial damages caused by illegal sales. In addition, civil claims must also be brought in a court in the region where the infringement is alleged to have occurred. Regional courts tend to lack regular exposure to -- and knowledge of -- this relatively new and complex area of law, which has historically inhibited the successful prosecution of violations.

----- OPTICAL MEDIA PROTECTION -----

18. (SBU) Two plants in Kazakhstan produce optical discs. One specializes in films and music, the other in software. Both plants have source identification codes (SID's) issued by the IFPI (International Federation of the Phonographic Industry) and, as IIPA notes, provide samples of their products for use as forensic evidence.

----- SOFTWARE INDUSTRY ENGAGEMENT -----

19. (SBU) According to local Microsoft representatives, all newly procured government computers have licensed software. While some older government computers may still be loaded with unlicensed software, overall the Microsoft representative expressed strong

satisfaction with the government procurement situation. Most recently, Microsoft founder Bill Gates and the CEO of Samgau (Kazakhstan's state-owned technology and innovation holding company) signed an MOU on plans for future cooperation in the development of educational technologies, as well as collaboration in IPR protection and enforcement. Microsoft is recognized for its successful engagement in defense of IPR in Russia; its enhanced partnership with the GOK is expected to improve IPR protective capacity in Kazakhstan, with a particularly heavy focus on the prevention of internet-related piracy.

¶10. (SBU) Despite the positive relations developing between Microsoft and the GOK, Microsoft representatives recommend that Kazakhstan be placed on the Special 301 Watch List. Recent findings from Microsoft-funded research indicated that levels of privately used pirated (or unlicensed) software remains extremely high. According to their data, 92.9 percent of privately owned PC's in Kazakhstan utilize of illegally obtained software. (Note: Their data also indicated that the overwhelming majority of respondents believed piracy rates would decrease if the prices of commercially available software were to be lowered. This opinion was also shared by the General Prosecutor's Office. End note.)

SCHEDULED AND ENACTED IPR LEGISLATIVE IMPROVEMENTS

¶11. (SBU) During the reporting period, Kazakhstan continued to pursue legislative changes that strengthen the government's hand in protecting intellectual property rights. The legal basis for preventing and prosecuting IPR violations remains the "Law on Amending Legislative Acts of the Republic of Kazakhstan on the Issues of Intellectual Property", which entered into force on November 26, 2005. This law amended the country's Criminal Code, Criminal Procedure Code, Civil Code, Administrative Code, and the Copyright Law as they pertain to the protection of intellectual property (ref B). Amendments to the Patent Law were ratified in 2007, significantly simplifying the patent system (as compared with the old Soviet two-stage system) and bringing it into closer conformity with international standards.

¶12. (SBU) Proposed amendments to the Copyright Law, Law on Trade Marks, Law on Licensing, and Customs Code are currently being evaluated by independent experts. Proposed amendments to the Copyright Law have been praised by private industry representatives in as much as they directly address the weaknesses hindering copyright enforcement in civil courts (see para 7 above). New amendments will relieve IPR holders of the heavy burden of proof, and will facilitate effective law enforcement. In accordance with WIPO requirements, the draft amendments also detail the use of technical means for the protection of copyrights, specifically prohibiting the removal of any types of technical or coded copyright protection technologies. The IPR Committee is confident that the proposed amendments to the Licensing Law stipulating mandatory licensing for the commercial reproduction of any copyright protected audio and visual recordings meet WTO requirements. These amendments are scheduled to come before Parliament in late May-early June ¶2008.

¶13. (SBU) Amendments to Customs Legislation granting ex officio authority to customs agents are scheduled to come before Parliament in November 2008. These amendments will grant customs agents the authority to more readily seize counterfeit goods at the border, which has long been recommended by the International Intellectual Property Alliance (IIPA.)

IIPA REPORTING AND CONCERNS ADDRESSED

¶14. (SBU) Over the last several years, IIPA reporting has consistently reiterated several concerns regarding the development and efficacy of IPR protective measures in Kazakhstan. They have also, however, continued to report several significant inaccuracies.

¶15. (SBU) The IIPA report states that "only the Ministry of Justice (Copyright Office) and not the police can bring charges for

[administrative violations]" and recommends "that the existing police authority be broadened to include administrative violations as well." Article 620 of the Administrative Violations Code specifically provides such powers to the police.

¶16. (SBU) The IIPA's assertion that the 2004 statutes only provide for a 50-year term of copyright protection is inaccurate, as the November 2005 amendments specifically provide for the extension of copyright protection to 70 years, in keeping with international standards.

¶17. (SBU) The IIPA repeats another error from its 2006 and 2007 reports, overstating the minimum damages threshold for criminal prosecution. IIPA misinterprets what it calls "the key amendment" in the November 2005 legislation. i.e., the change to Article 184 of the Criminal Code, which repealed the undefined "huge damage" threshold for criminal cases and replaced it with a threshold of 100 Monthly Calculation Units (MCU's). The IIPA incorrectly reported that one MCU is the equivalent of 36,495 tenge (\$304), when in fact it is currently set to just 1,168 tenge (\$9.60). Thus, the IIPA overstates the all-important minimum damages threshold for criminal prosecution by a factor of more than thirty.

¶18. (SBU) The IIPA cites Kazakhstan's need to establish a legal basis for the confiscation and destruction of equipment used in the criminal manufacture of pirated goods. The IPR Committee continues to assure post that a combination of statutes in the Criminal Code and the Criminal Procedure Code constitutes an adequate provision for the confiscation of such equipment. Moreover, the IPR Committee has stated that such confiscations are routinely carried out and do not require a court order. A court order is necessary only to destroy such equipment -- a procedural requirement which the IPR Committee defends as necessary to preserve potentially material evidence. It should also be noted that the abovementioned proposed amendments to the Copyright Law will require judges, in the event of a conviction, to make a ruling regarding the named piracy equipment. This provision is expected to increase occasions in which confiscated equipment will be destroyed.

COMMENT

¶19. (SBU) Kazakhstan's continued progress on and commitment to IPR protection merits its continued exclusion from the Special 301 Watch List. The efforts of the IPR Committee within the Ministry of Justice are expected to bear fruit in 2008 in the ratification of amendments to numerous IPR-related laws. Post takes growing private sector participation in the enforcement of IPR as a very positive indicator of progress. At this stage, acknowledging Kazakhstan's significant achievements while stressing to the GOK that they must continue to enhance their IPR efforts is a better approach to facilitate further U.S.-Kazakhstani IPR cooperation and achieve results on the grounds than returning Kazakhstan to Watch List status. End Comment.

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